

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EVODIO DOMINGUEZ,

Defendant and Appellant.

B232986

(Los Angeles County
Super. Ct. No. BA363924)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Michael E. Pastor, Judge. Affirmed in part and reversed in part.

Edward H. Schulman, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D.
Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Evodio Dominguez appeals from his convictions and sentences on multiple counts of continuous sexual abuse of a child; lewd conduct; and attempted aggravated sexual assault upon two of his step-daughters, Martha A. and Alexis H. Appellant's first trial resulted in guilty verdicts on three counts relating to Martha A. The jury also found the multiple victim enhancement alleged in connection with the three counts concerning Martha A. "not true." As to Alexis H., the jury returned not guilty verdicts on five counts, and made no findings as to the multiple victim enhancements alleged in the counts pertaining to Alexis H. The jury was unable to reach a verdict as to two counts relating to Alexis H. and one count relating to Martha A. The court declared a mistrial as to those three counts and they were retried before a different jury. The second trial resulted in guilty verdicts on the two counts relating to Alexis H., and no verdict on the retried count relating to Martha A. In a separate proceeding the court found "true" the multiple-victim enhancements.

Before this court, appellant asserts several errors relating to the second trial. First he complains that the court erred in admitting expert testimony concerning "Child Sexual Abuse Accommodation Syndrome ("CSAAS") because the evidence was unnecessary and usurped the jury's role as the fact finder on the ultimate issue of whether appellant committed the crimes alleged. Second appellant also complains that the court's finding of "true" on the multiple-victim enhancements violate the principles of double jeopardy because the jury in the first trial found the multiple-victim enhancement allegations "not true." As we shall explain below, appellant's claim concerning the admission of the evidence lacks merit. With respect to the true findings on the multiple victim allegations, we conclude that although the true findings on three of the counts do run afoul of double jeopardy principles and must be reversed, any error was harmless. At sentencing, the court applied the enhancement based on the multiple victim allegation to enhance appellant's sentence on a count which did not implicate double jeopardy.

BACKGROUND AND PROCEDURAL HISTORY

The Family.

Appellant married Martha A.'s and Alexis H.'s mother in the late 1990s. At the time Martha A. was about eight years old, and Alexis H. was approximately six years of age. The family also included the girl's older sister Grace A., who was approximately 13 at the time. Appellant and the girl's mother subsequently had three additional daughters. They lived in Los Angeles. The girls' mother worked in the afternoon and nights.

The Crimes.

According to Martha A., when she was about 10 years old, appellant began sexually abusing her. On one occasion, Martha A. was asleep in her mother's bed with her younger sister. She awoke when appellant touched her. He rubbed her chest and vagina over her clothes for approximately 10-20 minutes. Afterwards, appellant told Martha A. that if she ever told anyone about the incident, he would take away her little sister. Martha A. believed him; she did not tell anyone what appellant had done to her because she was scared.

Appellant continued to abuse Martha A. at night, while her mother was at work, three or four times a week from when she was 10 until she was 18 years of age. In some instances appellant would put his hands under Martha A.'s clothes and touch her breast and vagina. Sometimes he would put his mouth on her vagina. At least once, appellant pulled down Martha's underwear and pajamas and tried to penetrate her from behind. She could feel his erect penis touching her vagina and buttocks.

On another occasion when Martha was 12, she went to sleep on a couch. She woke up because appellant was on top of her. Her clothes and blankets were gone, and appellant was trying to force her legs apart to penetrate her vagina with his penis. Martha closed her legs very tightly and struggled to push appellant away. She hit him, but his penis penetrated her vagina slightly before she fought him off. Another time appellant carried Martha A. into the bathroom and tried to make her sit on his naked lap, but she got away.

Martha did not tell anyone about the attack or any of the other instances of abuse because she was afraid of what might happen and believed that her mother loved appellant.

However, when Martha A. was 16 years old, she told her older sister Grace A. what appellant had been doing to her. Grace told their mother, who confronted appellant. She kicked him out of the house for a couple of weeks but he was eventually allowed to return to the family.

When appellant moved out, Alexis was 12 or 13 years old. Alexis was “really close” to appellant and considered him her father. When she inquired about where he had gone, Martha A. and Grace A. told her what appellant had done to Martha A. Alexis was angry with Martha after that, because she considered appellant her father. She accused Martha of lying about appellant.

At the time, however, Alexis H. did not reveal that appellant had also been acting inappropriately towards her for several years. When Alexis H. was 10 years old, appellant began touching her in ways that made her uncomfortable. He often kissed her on the mouth, put his tongue in her mouth, then told her he loved her. He kissed her and put his tongue in her mouth at least twice, once in the bedroom and once in the living room. Appellant would also grab her waist from behind and rub his penis against her. She could feel his erection. Appellant touched Alexis's “butt” with his hand 10 or 12 times when she was between the ages of 11 and 15 years old. Alexis H. said that she never told anyone about appellant touching her because she was scared.

Appellant slowly reintegrated himself into the household and eventually moved back in with the family. After appellant moved back into the house, it seemed to Martha “like everybody forgot . . . about what happened.” Martha A. stopped speaking to appellant, but he continued to touch Martha on her chest and vagina, on top of her clothes. He did this two or three times a week. Martha A. did not tell her mother that appellant continued to touch her inappropriately, but said she discussed it once or twice with her sisters, Grace A. and Alexis H.

In 2008, the girls' mother passed away. Martha A. went to live with her grandmother in Texas, while Alexis H. and the younger girls continued to live with appellant. In the spring of 2009, Martha A. returned home briefly. During the visit, appellant touched her chest over her clothes. Martha A. also saw appellant "being really, really touchy with" her younger sister, Alexis H. Appellant's behavior upset Martha A. She told Grace to look out for Alexis, and that she did not like the way appellant touched her.

Martha returned to appellant's house in the summer of 2009 and accompanied her younger sisters and appellant on a visit to Mexico. In Mexico, appellant tried to touch Martha's vagina, but she moved away.

Martha decided to report appellant to the police because she was worried about her younger sisters. In September 2009, she and her sisters went to a police station and spoke to a detective. She also spoke to a Department of Children and Family Services investigator, and the prosecutor and revealed that appellant had been abusing her for a number of years.

When Alexis H. spoke to a police officer and the social worker about appellant, she lied and said appellant had not touched her. Alexis H. did not disclose that appellant touched or kissed her because she was scared, and did not want anything to happen to appellant. She felt sorry for him, and loved him as her father.

After her first interview at the police station, Alexis went to live with her aunt. She trusted her aunt, and after talking to her, decided to reveal what appellant had done to her. Alexis H. then spoke to a detective and told her that appellant had touched her inappropriately. Alexis estimated that appellant touched her inappropriately approximately 20 times when she was between the ages of 10 and 15.

In September 2009, a Children's Social Worker with the Los Angeles County Department of Children and Family Services, began investigating the allegations against appellant. When interviewed, appellant admitted that he had sexually abused Martha A. since she was age 10.

First Trial.

An amended information charged appellant with 12 counts of criminal offenses committed against Martha A. and Alexis H. The crimes alleged against Martha A. were as follows: count 1, lewd act upon a child (Pen. Code, § 288, subd. (a)) committed between July 18, 2000, and November 10, 2000; count 2, continuous sexual abuse (Pen. Code, § 288.5, subd. (a)), between November 11, 2000, and November 10, 2002; count 3, aggravated sexual assault of a child (Pen. Code, § 261, subd. (a)(2)) between November 11, 2002, and November 10, 2003; count 4, aggravated sexual assault of a child (Pen. Code, § 261, subd. (a)(2)) between November 11, 2002, and November 10, 2004;¹ count 5, lewd act upon a child (Pen. Code, § 288, subd. (a)) between November 11, 2002, and November 10, 2004.

The crimes alleged against Alexis H. were as follows: counts 8-12, forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)) committed between January 26, 2005, and January 25, 2008; counts 13 and 14, forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)) committed between January 26, 2005, and January 25, 2008. The information alleged as to all counts that appellant committed an offense specified in Penal Code section 667.1, subdivision (b), against more than one victim. Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty of the charges in counts 1, 2, 4, and 5. The jury found the attendant multiple victim allegations on those counts to be “not true.” The jury found appellant not guilty of the charges in counts 10 through 14. The jury could not reach verdicts as to the charges in counts 3, 8, 9. The court entered a mistrial as to those counts.

¹ At the close of evidence, the trial court amended the charges in count 4 to be attempted aggravated sexual assault on a child (Pen. Code, § 261, subd. (a)(2), § 664).

Second Trial.

The prosecutor decided to re-try appellant on count 3 (aggravated sexual assault against Martha A.); count 8 (forcible lewd act against Alexis H.), and count 9 (lewd conduct against Alexis H.) renumbered as counts 1, 2, and 3, respectively.

Prior to the second trial the prosecutor filed a motion requesting that it be allowed to present expert testimony about Child Sexual Abuse Accommodation Syndrome (“CSAAS”) from a clinical psychologist who specialized in traumatic sexual abuse, Dr. Jayme Bernfeld. The prosecutor explained that the evidence would assist the jury in its consideration of both Alexis H.’s delay in reporting the abuse and the inconsistent statements she made to the social worker about whether she had been abused. Appellant’s counsel opposed the motion, contending that the testimony was unnecessary because Alexis H. could explain her inconsistent statements and delayed reporting and because the evidence would simply “tell us what everybody with common sense knows”—that abuse victim’s do not always immediately or accurately report the abuse they suffer. The court granted the motion, finding that it would be of assistance to the jury.

Thereafter during the trial Dr. Bernfeld testified as an expert concerning the aspects of CSAAS. Dr. Bernfeld explained that CSAAS is a “model” to help understand how children behave following sexual abuse, particularly when the abuser is someone they know. CSAAS explains why some children “don’t do what is expected immediately following abuse, which is to immediately disclose, to fight back, and behaviors like that.”

Dr. Bernfeld explained that the CSAAS has five parts. The first part is secrecy; the sexual abuse occurs in private, and the fact that it occurs in private is an unspoken message to the child that it is something that shouldn’t be discussed. When the abuser is a parent or step-parent with a close relationship with the child victim, the child is much more likely to keep the abuse secret. The second part of the model is helplessness of the child victims. The third part of the model is accommodation by the child, who submits to the abuser without fighting back or doing anything directly to stop the abuse. The fourth part of the model is delayed disclosure. Dr. Bernfeld explained that even though many

people believe that an abused child would immediately disclose the abuse, most children who are sexually abused never disclose. Very few disclose within a year, and some may disclose within five years of the abuse, but most never disclose. The fifth part of the model is recantation, and applies to the children who do disclose abuse and then face repercussions. The children recant or offer inconsistent statements because they are not believed, or they lose contact with the person who abused them.

The fact that there is another caregiver in the home does not necessarily change the model because children tend not to tell their parents information they know would upset them. Children also fear that they will not be believed, especially compared to an adult. Many children will not disclose sexual abuse by a caregiver even when questioned directly.

Dr. Bernfeld also testified that she knew nothing about appellant's case; she had not met any of the people involved nor read any reports. She offered no opinion on whether Martha A. or Alexis H had actually been abused by appellant.

Martha A., Alexis H., Grace A. and the social worker testified in the second trial as they had in the first trial. The jury found appellant guilty as charged in counts 2 and 3. The trial court declared a mistrial as to count 1. In bifurcated proceedings, the trial court found the multiple victim allegations to be true.

The trial court sentenced appellant to serve a total of 39 years and 4 months in state prison on the convictions from the first trial and the convictions from the second.

Appellant's timely notice of appeal followed.

DISCUSSION

I. The Court Did Not Abuse Its Discretion in Admitting CSAAS Evidence Or in Instructing the Jury

Before this court appellant complains that the court erred by admitting expert testimony on CSAAS because: (1) the evidence had minimal relevance and little probative value because the victims' testimony explained why they delayed reporting the abuse; (2) the expert testimony improperly invited the jury to draw the conclusion that

Alexis H. had been molested based upon behavior consistent with CSAAS and thus usurped the jury's fact-finding function. He also assails the jury instruction (CALCRIM No. 1193) concerning CSAAS evidence for the same reason – it allowed the jury to base its finding of guilt on the assumption in the expert's testimony that appellant had in fact committed the crimes alleged. We address these contentions in turn.

CSAAS cases involve expert testimony regarding the responses of a child molestation victim. CSAAS consists of five emotional behaviors that have been observed in children who have experienced sexual abuse: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. (See *People v. Bowker* (1988) 203 Cal.App.3d 385, 389 (*Bowker*).) For more than two decades California courts have allowed expert testimony regarding CSAAS for limited purposes. (See *id.* at p. 391, citing *In re Sara M.* (1987) 194 Cal.App.3d 585; *Seeing v. Dept. of Social Services* (1987) 194 Cal.App.3d 298, 310-311, 313; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099 (*Roscoe*).) CSAAS expert testimony is not admissible to prove the sex crime charged actually occurred. (*Bowker, supra*, 203 Cal.App.3d at p. 391, *Roscoe, supra*, 168 Cal.App.3d at p. 1099.) However, CSAAS evidence is admissible to (a) rebut a defendant's attack on a child's credibility, (b) rehabilitate a victim's credibility, to disabuse jurors of specific myths or misconceptions suggested by the evidence,² and to explain the emotional antecedents of a child's self-impeaching behavior. (*Bowker, supra*, 203 Cal.App.3d at pp. 393-394; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383; superseded on other grounds in *People v. Levesque* (1995) 35 Cal.App.4th 5, *People v. Brown* (2004) 33 Cal.4th 892, 906

² Identifying a “myth” or “misconception” has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.)

(*Brown*).)³ For example when a child significantly delays reporting, or recants her story in whole or in part, an expert could testify on the basis of her experience and past research that “such behavior is not an uncommon response for an abused child. . . .” [Citation.]” (*Brown, supra*, 33 Cal.4th at pp. 905-906; *Bowker, supra* 203 Cal.App.3d at p. 394; *People v. Housley* (1992) 6 Cal.App.4th 947, 955-956.)

We review the court’s decision to admit expert testimony for an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.)

A. *The CSAAS evidence was relevant to assess the victim’s credibility.*

Appellant argues that the CSAAS evidence should have been excluded because it was unnecessary as both victims testified as to their delays in reporting the abuse. Appellant’s argument is beside the point.

The fact that both Martha A. and Alexis H. explained why they had delayed reporting the abuse does not deprive the CSAAS of its probative value. A review of the record makes clear that the victims’ credibility was an important issue, if not the central issue, at both trials. Appellant’s defense centered on discrediting Martha A. and Alexis H. He attacked their explanations regarding their conduct and disclosure, but his efforts to impeach them went beyond reasons for the delayed disclosure. His counsel told the jury that “not only is Martha lying to you, but she is lying about the fact that she and probably others are working on Alexis” to make her falsely accuse appellant of abuse. He also argued, “You have Martha lying to you straight up.” Defense counsel suggested that Martha manipulated Alexis and encouraged her to fabricate the abuse allegations. The prosecution was entitled to rehabilitate the victims’ credibility. (*People v. Patino*,

³ Our Supreme Court has recognized that CSAAS evidence may be relevant, useful, and admissible in a given case. Our role as an intermediate appellate court does not allow us to rule otherwise. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1301-1302 (*McAlpin*); *Brown, supra*, 33 Cal.4th at pp. 905-906; see *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

supra, 26 Cal.App.4th at p. 1747; *People v. Housley* (1992) 6 Cal.App.4th 947, 956.) The CSAAS testimony was thus pertinent and admissible for that purpose.

In addition to explaining the concept of delayed reporting, Dr. Bernfeld also testified on other patterns of CSAAS behavior: secrecy, helplessness, and accommodation. These patterns were relevant to the victims' testimony that they were afraid to fight back, and had a continuing relationship with appellant. To the lay juror, Martha A.'s and Alexis H.'s behavior might appear absurd and inconsistent with having been abused. To explain such behavior and rehabilitate the witness's credibility, the prosecution was permitted to introduce limited credibility evidence to clarify misconceptions suggested by the evidence. (*Patino, supra*, 26 Cal.App.4th at p. 1745; *McAlpin, supra*, 53 Cal.3d at p. 1300.) As the Supreme Court stated in *McAlpin*: "Most jurors, fortunately, have been spared the experience of being the parent of a sexually molested child. Lacking that experience, jurors can rely only on their intuition or on relevant evidence introduced at trial." (*Id.* at p. 1302.) In light of the defense theory of the case and the evidence presented, the CSAAS testimony was permissible to support the victims' credibility and disabuse the jurors of any misconceptions regarding the behavior of the victims. (See *People v. McAlpin, supra*, 53 Cal.3d at p. 1300.) The trial court did not abuse its discretion by admitting CSAAS evidence.

B. The CSAAS expert testimony was not used to conclude the victim had been sexually assaulted.

It is improper for an expert testifying on CSAAS to provide "testimony which recites either the facts of the case at trial or obviously similar facts," because such testimony can too easily be misunderstood by the jury as an invitation to use the CSAAS testimony to determine whether the victim was molested, or as offering an expert opinion that the victim is credible. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1384.) "[T]he line between impermissible use of expert testimony to prove the child was abused, and permissible use of such testimony to "explain the emotional antecedents of abused children's seemingly self-impeaching behavior" [citation] is by no means a bright one[;] the better practice is to limit the expert's testimony to observations concerning the

behavior of abused children as a class and to avoid testimony which recites either the facts of the case at trial or obviously similar facts.” (*Id.* at pp. 1383-1384.)

We find that the CSAAS evidence in this case was properly limited to the syndrome’s characteristics. Dr. Bernfeld testified that she did not review any reports and had not met anyone involved in the case. Dr. Bernfeld did not testify that the victims in this case were abused. Her testimony was limited to explaining the clinical aspects of CSAAS. In our view no reasonable juror would interpret the expert testimony as an expression of opinion on the question whether Martha A. or Alexis H. had been molested. (See *People v. Housley*, *supra*, 6 Cal.App.4th at pp. 955-956 [expert’s testimony that he had never met victim, and was unfamiliar with particular facts of case, rendered it unlikely that jury would consider CSAAS testimony for improper purpose].)

C. CALCRIM No. 1193 is a Proper Instruction.

Appellant argues that CALCRIM No. 1193 is flawed and misleading because it allowed the jury to base its finding of guilt on the assumption in the expert’s testimony that appellant had in fact committed the crimes alleged.⁴ We find no error.

⁴ Appellant did not object to this instruction and in fact agreed that it should be given. Nonetheless, we reject the Attorney General’s argument that appellant forfeited this claim by failing to object to the court’s instruction below. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1138 [forfeiture upon failure to request that otherwise correct instruction be clarified], overruled on another ground in *People v. Randle* (2008) 43 Cal.4th 76, 151, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, see also discussion, fn. 16, ante.) Appellant claims the instruction does not correctly state the law and affects his substantial rights. Thus, even in the absence of an objection we may consider the merits of a challenge to a jury instruction, if the instruction affected the appellant’s substantial rights. (Pen. Code, § 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [no forfeiture when “trial court gives an instruction that is an incorrect statement of the law”].) Thus, we may address his claim on appeal.

The trial court instructed the jury with CALCRIM No. 1193 as follows:

You have heard testimony from Dr. Jayme Bernfeld regarding the child sexual abuse accommodation syndrome. Her testimony about child sexual abuse accommodation syndrome is not evidence that any crime was actually committed against either alleged victim or that the defendant committed any alleged crime. You may consider this evidence only in deciding whether or not Martha A.'s conduct or Alexis H.'s conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony.

The court's instruction expressly told the jury not to use the expert's testimony as evidence that the appellant abused the victims; and it advised the jury that it could consider the CSAAS evidence only for the limited purpose of evaluating whether the victims' behavior was inconsistent with having been molested.

Here, Martha A.'s and Alexis H.'s credibility was clearly in dispute and an important question for the jury to determine. Simply put, the CSAAS testimony was relevant and could help the jurors understand the inconsistencies and contradictions of Martha A.'s and Alexis H.'s conduct and determine whether they undermined their credibility and rendered all of their allegations unbelievable. Although evaluating their credibility is a step in determining what happened to the victims, we disagree with appellant's view that the instruction effectively, albeit implicitly, told jurors the CSAAS evidence could be used to determine whether appellant abused them.

In *McAlpin*, *supra*, 53 Cal.3d 1289, the Supreme Court reasoned: "expert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.] 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to

explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.” (Id. at pp. 1300–1301, fn omitted.) CALCRIM No. 1193 comports with *McAlpin*. Accordingly, the relationship between the CSAAS evidence and the victim’s credibility that is reflected in CALCRIM No. 1193 is not improper or flawed, and the trial court did not err in giving the instruction.

II. The Trial Court’s “True” Findings on the Multiple Victim Allegation on the Counts Pertaining to Alexis H. Do Not Implicate the Principle of Double Jeopardy, and The Trial Court’s “True” Findings on the Multiple Victim Allegation on the Counts Pertaining to Martha A. Resulted in Harmless Error

A. Relevant Proceedings

1. First Trial

a. Martha A.

Appellant was found guilty of counts 1, 2, 4, and 5. As to those counts, the jury found “Not True” the multiple victim allegation. The jury was unable to reach a verdict as to count 3 and a mistrial was declared.

b. Alexis H.

Appellant was found not guilty of counts 10 through 14 relating to Alexis. Further, the jury was unable to reach a verdict as to counts 8 and 9 and a mistrial was declared. The jury did not enter any findings on the multiple victim allegations on the counts pertaining to Alexis H. Following the court’s decision to declare a mistrial on counts 3, 8, and 9, the proceedings were continued.

2. Second Trial

a. Stipulation to Bifurcate the Multiple Victims Allegation

Prior to retrial, the parties agreed to bifurcate the multiple victim allegations from the substantive crimes charged in counts 3, 8, and 9. Thus, the only issues before the jury were whether the appellant was guilty as to counts 3, 8, and 9. The issues pertaining to the multiple victim allegations were to be determined by the court at a separate proceeding.

b. Martha A.

The jury was unable to reach a verdict as to count 3 and a mistrial was declared. Subsequently, the prosecution dismissed the count pursuant to Penal Code section 1385.

c. Alexis H.

Appellant was found guilty of counts 1 and 2.⁵

3. Court Trial on the Multiple Victim Allegations

After retrial, the court held a court trial on the multiple victim allegation under Penal Code sections 667.61, subdivision (b) and 1203.066, subdivision (a)(7) relating to counts 8 and 9. The court found the special allegations to be true, stating as follows:

“Based upon the evidence before this court, I am satisfied beyond a reasonable doubt that Mr. Dominguez committed the offenses in Counts 8 and 9, and Counts 1, 2 and 5 against more than one victim within the meaning of Penal Code Section 1203.066(A)(7) and Penal Code Section 667.61(C). So the court does find those particular allegations to be true. That is the verdict of the court.”

B. Analysis

Appellant contends that the first jury’s “Not True” finding on the “multiple victim” allegations constituted a jeopardizing event under the United States and California Constitutions. Further, appellant claims that the trial court was precluded from finding his crimes had been committed against more than one victim, because the first jury found the multiple victim allegation not true in the context of the three crimes committed against Martha A. Accordingly, appellant argues that the findings must be vacated and the entire case remanded for resentencing without regard to any one-strike sentencing provision.

⁵ Counts 8 and 9 were renumbered as 1 and 2 respectively in the second trial.

The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. (*People v. Bright* (1996) 12 Cal.4th 652, 660-661.) These principles of double jeopardy apply to penalty allegations. (*People v. Anderson* (2009) 47 Cal.4th 92, 102.)

The court's statement of its verdict on the multiple victim enhancements after the second trial could be interpreted as revisiting and contradicting the first jury's "not true" findings on counts 1, 2, and 5 with respect to Martha A. which would run afoul of the double jeopardy principles. For this reason, the lower court's true findings on counts 1, 2, and 5 with respect to Martha A. cannot stand.

Notwithstanding this conclusion, the court's "true" findings on the enhancement allegations on counts 8 and 9 relating to Alexis H. do not implicate double jeopardy because the first jury did not reach verdicts (or make findings) as to those counts relating to Alexis H.⁶

Further, appellant ignores the fact that during retrial, both parties agreed to bifurcate the multiple victim allegations. Thus, the second jury never decided the issue of the multiple victim allegation on the counts relating to Alexis H., the court made the determination on that allegation. Simply stated, the issue of whether appellant had committed his crimes against more than one victim⁷ in the context of the crimes against

⁶ In fact, the first jury could not have decided the multiple victim allegations in counts 8 and 9 relating to Alexis H. (*People v. Anderson, supra*, 47 Cal.4th at p. 102 ["[T]he jury must first decide whether all the elements of the underlying substantive crime have been proven. . . . If the jury convicts on the substantive crime, it then independently determines whether the factual allegations that would bring the defendant under the One Strike sentencing scheme [set forth in Penal Code section 667.61] have also been proven."].) Here, because the jury could not reach a verdict on the substantive counts, the jury could not have deliberated on the multiple victim allegation. Accordingly, appellant's issue preclusion argument also fails. (See *People v. Wutzke* (2002) 28 Cal.4th 923, 930-931).

⁷ In this case, the trial court considered Martha A. as the other victim.

Alexis H. had never been considered until the trial court judge considered the issue during the court trial on those allegations. Accordingly, because this issue had never before been decided, double jeopardy principles do not apply to the counts relating to Alexis H.

Finally, we note that at sentencing the court applied the sentencing enhancement based on the multiple victim allegations to enhance appellant's sentence only on count 8 pertaining to Alexis H. Consequently, any error with respect to the court's findings at the court trial as to the counts pertaining to Martha A. on the multiple victim allegations is harmless.

DISPOSITION

The trial court's "true" findings on the multiple victim allegation under Penal Code sections 667.61, subdivision (b) and 1203.066, subdivision (a)(7) relating to counts 1, 2, and 5 are reversed. The judgment is affirmed in all other respects.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.